

FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

DISPATCHED BY 92-70 ✓
MM DocId 32554

In re Applications of

SABLE COMMUNITY BROADCASTING CORPORATION
(hereafter "Sable")

Channel 217A
Hobson City, Alabama

BOARD OF TRUSTEES SHORTER COLLEGE
(hereafter "Shorter")

Channel 217A
Rome, Georgia

GADSDEN STATE COMMUNITY COLLEGE
(hereafter "State")

Radio Station WSGN (FM)
Channel 217C2
Gadsden, Alabama

TRINITY CHRISTIAN ACADEMY
(hereafter "Trinity")

Channel 217A
Oxford, Alabama

For Construction Permits for New
and Modified Noncommercial FM
FM Facilities on Channel 217
(91.3 MHz)

HEARING DESIGNATION ORDER

Adopted: April 1, 1992;

Released: April 15, 1992

By the Chief, Audio Services Division:

1. The Commission has under consideration the above-captioned mutually exclusive applications.

2. *Preliminary Matter.* Three of the four captioned applicants are proposing to construct new facilities on Channel 217; State is proposing to upgrade its licensed facilities from Channel 218A (91.5 MHz) to Channel 217C2. Section 73.509 of the Commission's rules states, in pertinent part, that applications for new or modified noncommercial FM facilities will not be accepted if the proposed operations of co-channel facilities involve overlap of the interfering (40 dBu) and protected (60 dBu) signal strength contours of the respective stations. According to our engineering analysis, it is clear that all of the stations are involved in some overlap situations.¹ Accordingly, the applications are mutually exclusive and must be consolidated for hearing. *Ashbacker Radio Co. v. FCC*, 326 US 327 (1948).

3. *Sable.* Sable indicates that it will cost \$49,650 to construct and operate its proposed facilities for three months. While it claims to have \$10,000 in existing and new capital, the majority of its expenses are to be covered by a grant from a \$40,000 grant from the National Telecommunications Information Agency. Our records indicate that Sable's proposal was not granted. Accordingly, an issue must be specified in this matter.

4. Applicants for new broadcast stations are required by Section 73.3580 of the Commission's Rules to give local notice of the filing of their applications. We have no indication that Sable published the required notice. To remedy this deficiency, Sable must publish local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

5. *Shorter.* Section II, Item 4 of FCC Form 340 (May, 1985) required governmental and public educational institutional applicants to specify the residential address for each member of its governing board. Shorter has not completed this item correctly, providing a post office box number for four members (Herrin, Todd, Whitworth and Wyatt) of its governing board. Accordingly, Shorter must submit an amendment giving all the information required by this item to the presiding Administrative Law Judge within thirty days of the release of this Order.

6. Shorter's application contains two engineering sections (Section V-B) listing two differing transmitter sites. One section lists the site's longitude as 85 degrees-11 minutes- 50 seconds; the second changes the longitude to 85 degrees-11 minutes- 45 seconds. Since the corresponding site maps agree with the respective listed coordinates, there is no question of the applicant's acceptability in this regard. However, Shorter's inclusion of both sets requires formal clarification of its intent. Therefore, Shorter will be required to submit a clarifying amendment to the presiding Administrative Law Judge within thirty days of the release of this Order.

7. *State.* On March 10, 1992, State tendered a major change amendment to its application, proposing to change its frequency from Channel 217C2 to Channel 218C3. Section 73.3573(a)(1) of the Commission's rules defines

¹ Specifically, our study reveals the following:

Protected
Contour Of
Sable
Shorter
State
Trinity

Receiving
Interference From
State, Trinity
State
Sable, Shorter, Trinity
Sable, State

such changes as "major change" amendments, which require specification of a new cut-off date to enable interested parties a restricted period to file petitions to deny. State acknowledges this fact, and requests waiver of the Commission's processing rules in this regard. In support of this request, State claims that acceptance of the amendment would resolve mutual exclusivity with all other applicants in this proceeding. While this claim may be true, acceptance after its application proceeded through the Commission's cut-off procedures would deprive theoretical potential applicants and/or objectors of any reasonable notice of its revised intentions. *Letter to James P. Riley, Esq.*, 6 FCC Rcd 4382, 4383 (1991). Accordingly, State's request for waiver will be denied and its March 10, 1992 amendment will be returned.

8. On November 26, 1991, State was requested to submit an amendment demonstrating its compliance with the provisions in 47 C.F.R. § 73.525 governing television channel 6 protection. *Letter to Gadsden State Community College from Dennis Williams, Chief, FM Branch*. While State responded, its amendment demonstrated compliance with this rule section in terms of its proposed amendment to Channel 218C3. As noted above, that amendment must be returned. Accordingly, we have no evidence that State's operations on Channel 217C2 comply with the provisions in § 73.525. An issue will therefore be specified.²

9. *Trinity*. Trinity petitioned for leave to amend its application on January 24, 1992. The accompanying amendment was filed after January 13, 1992, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

10. *Other matters*. Our engineering study indicates that the proposals submitted by Sable and Shorter may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985), failing specifically to address how each intends to resolve any RF exposure to workers on their respective towers. Consequently, we are concerned each may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). See also, *Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311.

47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since Sable and Shorter's proposals may have a significant environmental impact as defined

by 47 C.F.R. § 1.1307, both will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. See generally, OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation," at 28. Sable and Shorter will therefore be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. See *Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the environmental assessments, that the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue will be deleted and the presiding judge shall therefore not consider the environmental effects of the proposal. See 47 C.F.R. § 1.1308(d).

11. The applicants have not indicated whether an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement among themselves.

12. The respective proposals are for different communities. Only Sable and Trinity serve substantial areas in common. Consequently, in this situation, in addition to determining pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the two proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified. In all other situations, it will be necessary only to determine pursuant to Section 307(b), which of the proposals would best provide a fair, efficient and equitable distribution of radio services.

13. Inasmuch as it appears that there would be a significant difference in the size of the populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

² The Commission's letter inadvertently stated that failure to respond to this request for additional information would subject

the application to dismissal for failure to prosecute.

14. Except as indicated above, the applicants are qualified to construct and operate as proposed. However, since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding.

15. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Sable whether the applicant is financially qualified.

2. To determine whether State is in compliance with the provisions of 47 C.F.R. § 73.525.

3. If a final environmental impact statement is issued in which it is concluded that Sable and/or Shorter's proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by Sections 1.1301-1309 of the Commission's Rules.

4. To determine, where appropriate: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and populations served thereby; (b) whether a share-time arrangement between some or all of the applicants would result in the most efficient use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

5. To determine, in the event it is concluded that a choice between Sable and Trinity's applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall educational operation and objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

6. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

16. IT IS FURTHER ORDERED, That Sable shall inform the presiding Administrative Law Judge within 30 days of the release of this Order as to whether local notice of filing of its application has been published.

17. IT IS FURTHER ORDERED, That Shorter shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 340 to the presiding Administrative Law Judge within 30 days of the release of this order.

18. IT IS FURTHER ORDERED, That, pursuant to paragraph 6 hereinabove, Shorter shall submit an amendment clarifying its dual technical sections with the presiding Administrative Law Judge within 30 days of the release of this Order.

19. IT IS FURTHER ORDERED, That the request for waiver of the FM application processing rules filed by State IS DENIED, and the accompanying amendment IS RETURNED.

20. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Trinity IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

21. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Sable and Shorter shall submit the environmental assessment required by § 1.1311 to the presiding Administrative Law Judge, with a copy to the Chief, Audio Services Division.

22. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

23. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

24. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau